One last matter remains and that is the question of a meaningful undertaking in damages. The plaintiff had in his affidavit in support of his application for the injunction said that he was prepared to give the usual undertaking in damages. Since the court in Penang dismissed the application, the need for the undertaking did not arise. The Supreme Court, in allowing the appeal and granting the injunction sought, did not appear to require the plaintiff to give the undertaking. When the matter was argued before me, I was told that considering the value of the contracts and the expenditures that UEM had undergone and will undergo, any undertaking in damages by the plaintiff would be far from meaningful.

To my mind, in this kind of public interest litigation, to insist on imposing an undertaking in damages is to thwart "the public-spirited citizen from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped." The Court should be vigilant to see that its process is not being abused by frivolous or vexatious claims or claims that are not brought *bona fide*. But once satisfied that there are *bona fide* serious questions to be tried in respect of a genuine public interest litigation, it seems to me that the objective of the Courts having the jurisdiction to entertain such litigation would be neutralised if meaningful undertakings in damages have to be provided by the plaintiff. There is no hard and fast rule that in every case where an interlocutory injunction is given there should be such an undertaking in damages – see *A.G.* v. *Albany Hotel*[20], *Beecham Group* v. *British Lab. Pte. Ltd.*[21] and *Dein & Anor.* v. *Bealey.*[22] The Supreme Court did not ask for any undertaking in damages. I in turn, in the special circumstances of this case, do not insist that there be any such undertaking as a condition to the injunctions continuing to be in effect.

The applications (13) and (17) are dismissed with costs. The application (16) is allowed with costs. The 2nd and the 3rd defendants are struck out from being defendants in this suit. There will be an early date for the trial of the suit such date to be allotted upon application after the pretrial processes have been completed. In respect of this last order, there will be liberty to apply.

Order accordingly.

Solicitors: *Karpal Singh & Co.; Zaid Ibrahim & Co.*

KARPAL SINGH v. SULTAN OF SELANGOR

[O.C.J. (Abdul Hamid C.J. (Malaya)) September 16, 1987]

[Kuala Lumpur – Originating Summons No. R 8-31-86 of 1987]

Constitutional Law – Ruler of a State – Immunity from proceedings – Application of declaration against Sultan of Selangor – Alleged statement that he would not pardon anyone who has been sentenced to the mandatory sentence of death for drug trafficking in Selangor – Whether proceedings may be brought against Sultan – Whether statement made in official capacity or personal capacity – Federal Constitution, art. 181(2).

Civil Procedure – Application to strike out originating summons on ground that it is frivolous and vexatious and an abuse of the process of the court – Whether originating summons raises an issue which is justiciable – Process of clemency – Plaintiff's case hypothetical – Locus standi – Principles applicable in application to strike out originating summons – RHC 1980, O.18 r.19.

The applicant applied by Originating Summons for a declaration to the effect that the public statement made by the Sultan of Selangor and reported in the English newspapers that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking in Selangor is in violation of Article 42 of the Federal Constitution. The Sultan applied for an order to strike out the originating summons on the grounds: (a) that the Originating Summons discloses no reasonable cause of action in that the issue raised therein is not justiciable; (b) the Originating Summons is barred by reason of the provisions of Article 181(2) of the Federal Constitution; (c) the plaintiff has no *locus standi* to maintain the proceedings he has brought; and (d) the Originating Summons is scandalous, frivolous and/or abuse of the process of the court.

Held: (1) the Court has no jurisdiction to entertain the Originating Summons for reasons, first, that it raises an issue concerning the process of clemency which is not justiciable; secondly, that it does not relate to specific facts or events or if it does, these facts or events are hypothetical; thirdly, Article 181(2) of the Federal Constitution operates to bar the plaintiff's claim; and fourthly, that the plaintiff lacks the necessary *locus standi* to maintain these proceedings;

(2) since the declaration sought is as to the future and it relates to theoretical issues, it is embarrassing and can serve no good purpose;

(3) this is a plain and obvious case where the Court in the exercise of its jurisdiction should strike out the Originating Summons as being one which is frivolous and vexatious and an abuse of the process of the court.

Cases referred to:

(1) *Sim Kie Chon* v. *Superintendent of Pudu Prison & Ors.* [1985] 2 M.L.J. 385, 386.
(2) *Mellstrom* v. *Garner & Ors.* [1970] 2 All E.R. 9.
(3) *The Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade* [1921] 2 A.C. 438, 448.

(4) *Cox* v. *Green* [1966] 1 Ch. 216.
(5) *Lim Cho Hock* v. *Government of State of Perak & Ors.* [1980] 2 M.L.J. 148.
(6) *Michael De Freitas* v. *George Ramoutar Benny & Ors.* [1976] A.C. 239, 247.
(7) *Superintendent of Pudu Prison & Ors.* v. *Sim Kie Chon* [1986] 1 M.L.J. 494.
(8) *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, 562.

APPLICATION.

Karpal Singh, in person.

Tan Sri Abu Talib Othman, Attorney-General (*Mohtar Abdullah*, Senior Federal Counsel, with him) for the applicant/defendant.

Abdul Hamid C.J. (Malaya): His Royal Highness the Sultan of Selangor has sought to strike out the Originating Summons issued at the instance of Mr. Karpal Singh, the plaintiff, under Order 18 Rule 19 of the Rules of the High Court, 1980, and/or the inherent jurisdiction of the Court.

By his Originating Summons, Mr. Karpal Singh seeks determination of this Court and a declaration to the effect that the public statement allegedly made by the Sultan on July 26, 1987, and reported in the *New Straits Times* and *The Star* newspapers of the next day, that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking in the State of Selangor, is in violation of Article 42 of the Federal Constitution (hereafter called 'the Constitution') in that the Sultan can only reject a petition for clemency after considering the advice of the Selangor Pardons Board and then applying his mind to the petition before him.

In support, Mr. Karpal Singh relies entirely on the press reports as regards the statements attributed to the Sultan allegedly made at the opening of the general meeting of the Ex-Servicemen's Association, Selangor Branch. Photostatic copies of the press reports are exhibited.

Mr. Karpal Singh affirms that by publicly stating that he would not pardon anyone who has been sentenced to death for drug trafficking in the State of Selangor, the Sultan was effectively pre-empting any appeal to him for clemency thereby resulting in the negation of a constitutional right.

Mr. Karpal Singh also affirms that he has the necessary *locus standi* to bring these proceedings by virtue of his oath of office as a Member of Parliament which enjoins him to preserve, protect and defend the Constitution.

It is Mr. Karpal Singh's contention that Article 181(2) of the Constitution which states that no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity will not apply to the present case because the statement attributed to the Sultan was made in his official capacity.

The application to strike out is founded on grounds that (1) the Originating Summons discloses no reasonable cause of action in that the issue raised therein is not justiciable; (2) the Originating Summons is barred by reason of the provisions of Article 181(2) of the Constitution; (3) Mr. Karpal Singh has no *locus standi* to maintain the proceedings he has brought; and (4) the Originating Summons is scandalous, frivolous and/or an abuse of the process of the Court.

Principles governing an application made under Order 18 Rule 19 of the Rules of the High Court, 1980.

The principle is well-established. The Court has stated in *Sim Kie Chon* v. *Superintendent of Pudu Prison & Others*[1] that the principle is clear in that:

> "it is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 19 of the Rules of the High Court, 1980: 'The summary procedure under this Rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.' (*Attorney-General of Duchy of Lancaster* v. *L. & N.W. Railway Co.* [1892] 3 Ch. 274 *(Supreme Court Practice 1985)).*"

Court's observation

Before I consider the grounds, I would, in passing, observe that the sole foundation of the Originating Summons is the statement allegedly made by the Sultan as reported in the *New Straits Times* and *The Star* newspapers on July 27, 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.

I would also observe that there seems to be a flaw in the plaintiff's case in that, it is common

knowledge, the Sultan invariably speaks in Bahasa Malaysia and in that event the press reports of what the Sultan is alleged to have said would therefore have been a translation thereto. If so, who did the translation and was it accurate? Where is the translator's affidavit affirming the accuracy of the contents of the translation? In the absence of such an affidavit, the press reports would clearly be inadmissible.

Without the press reports, what other evidence is there to show what the Sultan said on the occasion concerned? In my view, therefore, the Originating Summons founded upon such premises may be held to be groundless. The judgment I am about to pronounce, however, is not founded upon such premises.

Plaintiff's case is hypothetical

What seems obvious from the Originating Summons is that the declaration sought does not relate to specific facts or events, and if it does, these facts or events are hypothetical, that is to say, they have not yet occurred and may never occur. It is nothing but a mere conjecture or speculation on the part of the plaintiff when he implies that the events about which he is apprehensive, namely, the decision to dismiss the petition for clemency by convicted drug traffickers would be made arbitrarily without regard to the recommendation of the Pardons Board of the State of Selangor, is in breach of Article 42(8) of the Constitution and that a dispute as to breach of a right would arise. The pertinent question is whose right is it? Is it the right of the plaintiff? I hardly think so. It may well be the plaintiff is a Member of Parliament and his oath of office demands that he preserves, protects and defends the Constitution, but such oath is clearly spelt out in general terms and my view is that it can have no relevance to the particular circumstances of this case. If it is not the right of the plaintiff, whose right is it? It certainly is not the right of a convicted trafficker, for mercy is not the subject of legal rights.

Whether declaration should issue

The plaintiff has by his Originating Summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: See *Mellstrom* v. *Garner & Ors.*[2]

The learned Attorney-General has referred to a textbook on Declaratory Orders, 2nd Edition, by P.W. Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought." (*The Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade*[3] at 448 *per* Lord Dunedin).

At this juncture, I would refer to *Cox* v. *Green*[4] where it was held:

> "that on its true construction, R.S.C., Order 15 rule 17 (Order 15 rule 16 of our R.H.C.), was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the court exercised its jurisdiction, one of those principles being that the court would not make a declaration in a dispute which was not a justiciable dispute."

I would also refer to the case of *Lim Cho Hock* v. *Government of the State of Perak & Ors.*[5] where the Court held that:

> "the court's power to make declaratory judgments is confined to matters justiciable in the Courts, and the binding declarations which it could make under Order 15 Rule 16 of the Rules of the High Court, 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters."

(See also section 41 Specific Relief Act, 1950.)

Strictly, it is a discretionary relief and the discretion is to be exercised judicially consistent with accepted principles. In the exercise of its discretion, the Court shall have regard to the facts and circumstances of each particular case before it decides to grant a declaration.

The Originating Summons, on the face of it, is, in my view, obviously unsustainable and, on this ground alone, the Court in exercise of its powers under Order 18 Rule 19 could strike it out.

I now proceed to consider the grounds.

Is the issue justiciable?

On ground (1), I recall *Sim Kie Chon's* case where at p.386, the Court considered the nature of a power of clemency conferred upon the Yang di-Pertuan Agong and the Ruler of a State and then stated that:

"such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review. (See *Council of Civil Service Unions and Others* v. *Minister of the Civil Service* [1984] 3 All E.R. 935)."

The Court then went on to refer to the dictum of Lord Diplock in *Michael De Freitas* v. *George Ramoutar Benny and Others*[6] to the effect that 'Mercy is not the subject of legal rights. It begins where legal rights end." To the same effect was the decision of the Supreme Court in the sequel to that case in *Superintendent of Pudu Prison and Others* v. *Sim Kie Chon.*[7]

Basically, the Originating Summons relates, at least indirectly, if not directly, to an issue concerning the process of clemency which is clearly non-justiciable. The Court had again occasion to say in *Sim Kie Chon's* case at p. 386 that "though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly the Yang di-Pertuan Agong himself exercised the power in accordance with Article 42(1)." Likewise, the power is that of a Sultan in a State. Clause (9) of Article 42 cited by Mr. Karpal Singh does not make it mandatory on the Ruler to act on the advice. It only makes it obligatory on the part of the Pardons Board as constituted under Clause (5) of Article 42 consisting of specified persons to consider a written opinion which the Attorney-General may have delivered thereon before tendering advice.

In consideration, I form the view that the Originating Summons disclosed no reasonable cause of action and that the issue raised therein is not justiciable.

Originating Summons is barred by Article 181(2) of the Constitution

As for ground (2), I am firmly of the view that, in the light of Article 181(2) of the Constitution, the plaintiff's claim herein is plainly barred. The contention that the statement attributed to the Sultan was made by him in his official capacity is completely unacceptable. It is obvious that the statement was not made in the course or during the progress of a Pardons Board Meeting. On the contrary, it was done in his personal capacity. Assuming I am wrong, Article 181(2) would, in my view, still apply to bar the present proceedings as it is in fact and substance brought against the Sultan in his personal capacity. It is fundamental that a proceeding brought against a Ruler purportedly in his official capacity is in effect and substantially an action against the Ruler personally where such proceedings cannot otherwise be brought without proceeding against the Ruler personally. In such a case, Article 181(2) may clearly be invoked to bar such proceeding. Article 181(2) should, in my view, be construed not only in the light of the clear prohibitions enshrined in the Constitution but in line with the spirit and intention of the Constitution.

Locus standi

As regards ground (3), I would firmly say that an action may not be brought to Court by a stranger to it. Indeed, generally, a person may not even institute declaratory proceedings in respect of an act which, although prejudicial to his interests, may not affect him in his private rights. (See *Guaranty Trust Co. of New York* v. *Hannay & Co.*[8] *per* Pickford L.J. that "it does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him on other transactions.")

There are various approaches which a court may adopt in deciding the question of *locus standi.* One approach is to ask whether the plaintiff has "a cause of action." Another approach is to determine whether the plaintiff can establish a "right" which the court may declare. Yet another approach is to require the plaintiff to demonstrate "a special injury" resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an "interest" in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the court in the exercise of its discretion.

In my opinion, having regard to the facts and circumstances of this case, whichever of these approaches is adopted, the plaintiff in the present case has no *locus standi* to maintain the proceedings herein.

Court's finding

In consideration, I would hold that this Court has no jurisdiction to entertain the Originating Summons for reasons, firstly, that it raises an issue which is not justiciable; secondly, that it does not relate to specific facts or events or if it does, these facts or events are hypothetical; thirdly, that Article 181(2) of the Constitution operates to bar the plaintiff's claim; fourthly, that the plaintiff lacks the necessary *locus standi* to maintain these proceedings. I would also add that since the declaration sought is as to the future and it relates to theoretical issues, it is embarrassing and can serve no good purpose. It is, in my view, a plain and obvious case where the Court, in the exercise of my discretion, should strike out the Originating Summons as being one which I consider to be frivolous and vexatious and an abuse of the process of the Court.

I hasten to add that, in the light of the Court's finding, I see no valid reason to accede to the plaintiff's application to amend the Originating Summons for the plaintiff to proceed against the State Government.

Accordingly, I make an order in terms of the application.

The Originating Summons is struck out with costs.

Order accordingly.